No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF THE ASSOCIATION OF GENERAL MERCHANDISE CHAINS, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF THE ASSOCIATION OF GENERAL MERCHANDISE CHAINS, INC.

The Association of General Merchandise Chains, Inc. ("AGMC") submits this brief *amicus curiae*[1] in support of respondent Spray-Rite Service Corporation and urges that this Court not re-examine or modify the long-standing *per se* prohibition against vertical price fixing established by *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911). This issue, which was addressed neither by the court

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[1] This brief *amicus curiae* is filed with the consent of the parties pursuant to Supreme Court Rule 36.2. Letters containing the consent of the parties have been filed with the Clerk of the Court.

below nor by Monsanto in its Petition for Certiorari or Brief, has been injected into this case by the United States Department of Justice as *amicus curiae*.[2] For the reasons discussed below, this Court need not and should not question in this case the continued *per se* treatment of vertical price fixing. If the Court nonetheless decides to address this issue now, it should reaffirm the prohibition that has, for over 70 years, safeguarded effective price competition, and thereby contributed greatly to lower consumer prices and economic efficiency.

AGMC represents the nation's discount and variety general merchandise retail industry. A primary sales strategy of the retail stores comprising this industry is vigorous price competition. AGMC's membership includes retailers that operate more than 20,000 discount, variety, dollar, junior department, family center, off-price, factory outlet and other general merchandise stores. Its members range widely in size and include many of the nation's largest retail chains as well as companies active in one or more regions of the country and those with only a few locations, or even a single store. AGMC member company stores are located in all 50 states and account for over $40 billion in sales. AGMC believes that the position expressed in this brief not only reflects the views of its members but is also consistent with the publicly expressed views of other organizations representing retailers that engage in vigorous price competition.[3]

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[2] In its brief *amicus curiae* supporting Monsanto's petition for *certiorari*, the Department of Justice asserted that "the Court should grant review in this case to consider whether *all* vertical restrictions, including resale price maintenance, should be analyzed under the rule of reason." Brief for the United States as Amicus Curiae ("Amicus Petition") at 13 (emphasis in original). The House Committee on the Judiciary has termed "particularly disturbing" the fact that, through its *amicus* intervention in the instant case, the Department of Justice "sidestepped the narrower questions raised by the parties." H.R. Rep. No. 98-181, 98th Cong., 1st Sess. 22 (1983).

[3] *See Impact of Federal Antitrust Enforcement Policies on Small Business: Hearing Before the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business of the House Committee on Small Business*, 97th Cong., 2d Sess. 9 (1982) (Testimony of Jared O. Blum, Vice

The change in treatment of vertical price fixing sought by the Department of Justice threatens the viability of AGMC's members and of thousands of other retailers that depend on continued ability to offer products at competitive prices. By subjecting these distributors to the price control of manufacturers, the Department's proposed legal rule would deprive them of their fundamental business strategy of achieving high sales volumes through competitive pricing. Future entry by price-competitive retail enterprises into the market would be severely impeded. Consumers would pay higher prices as a result of this limitation on retail competition, and severe injury would inevitably result to a highly efficient, innovative form of distribution.

SUMMARY OF ARGUMENT

This Court ought not address whether vertical price fixing has properly been treated as *per se* illegal under the antitrust laws. Monsanto has raised threshold questions which can be addressed without undermining the *per se* illegality of vertical price fixing. The prohibition against vertical price fixing has shaped the way that products have been distributed for almost three-quarters of a century. Such a disruptive change in economic policy, if made at all, should be effected by Congress and not the Court, notwithstanding the judicial genesis of the principle. Congress is better able thoroughly to evaluate the ramifications of the change urged by the Department of Justice. In fact, after having conducted such an evaluation in 1975, Congress determined that vertical price fixing should not be permitted and invalidated state "fair trade" statutes that had allowed manufacturers to set retail prices. Moreover, this case provides a particularly inappropriate vehicle for a re-

Chairman, Small Business Legislative Council); *id.* at 366 (Testimony of James D. "Mike" McKevitt, Director of Federal Legislation, National Federation of Independent Business). Mr. McKevitt testified that a survey conducted in August, 1982 by the National Federation of Independent Business of its 505,000 members revealed that 73 percent opposed legalization of resale price maintenance.

evaluation of the illegality of vertical price fixing because of the presence of other issues, the lack of an adequate description of the vertical price-fixing arrangement, and the absence of any significant attention directed to the price-fixing issue either by the parties or by the appellate court.

If the Court does decide to address the issue suggested by the Department of Justice, it should strongly reaffirm the *per se* illegality of vertical price fixing. Vertical price fixing is destructive of both intrabrand and interbrand competition. Not only does vertical price fixing eliminate price competition among resellers of the same product, but it is a particularly effective mechanism for facilitating horizontal price-fixing conspiracies. A manufacturer's interest in promoting interbrand competition can be realized through nonprice means that preserve the opportunity for intrabrand price competition.

ARGUMENT

I. The Record Supports The Seventh Circuit's Conclusion That A Price-Fixing Conspiracy Had Been Proven

Monsanto's argument for reversal of the Seventh Circuit is based on its objection to the evidence from which an inference of a vertical price-fixing conspiracy can be drawn. It contends in its Petition for Certiorari[4] and in its Brief[5] that a conflict exists among the circuits with respect to the evidence needed to support an inference of concerted action involving a terminated dealer's former supplier and competitors.

In *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226, 1239-40 (7th Cir. 1982), the Seventh Circuit determined upon a review of the record that "[t]here was sufficient evidence to support the jury's verdict that Monsanto terminated

[4] Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at 20-28. *See also* Amicus Petition at 6-10.

[5] Brief of Petitioner Monsanto Company at 32-37. *See also* Brief for the United States as Amicus Curiae in Support of Petitioner ("United States Brief") at 7-12.

Spray-Rite pursuant to a conspiracy with other distributors to fix the resale price of Monsanto herbicides." The court had before it the jury's affirmative finding that there had been such a conspiracy, *id.* at 1233, and it identified the evidence on which this finding could have been based. *Id.* at 1239. Moreover, the court below termed Monsanto's reliance on *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*,[6] to be "misplaced" because, in that case, "[t]he only evidence of a conspiracy to fix resale prices was evidence of a price complaint from one distributor. . . . In this case, however, we have evidence of many complaints coupled with evidence refuting Monsanto's independent business reason for terminating Spray-Rite."[7]

As set forth exhaustively in Spray-Rite's Brief,[8] the record amply supports the jury's determination and the Seventh Circuit's affirmance thereof. In light of this abundance of evidence, this Court is not presented with the issue of the minimum amount of evidence needed to support an inference of conspiracy in a dealer termination case. Rather, because the evidence here would meet virtually any reasonable test, the Court need not delineate the level of evidence below which an inference of conspiracy cannot be supported.

Nonetheless, some have urged the Court to use this case as a vehicle to impose rigid standards for evaluating the sufficiency of the evidence. These standards would make recovery by a terminated dealer virtually impossible, because they would require the dealer either to negate all other possible causes of termination or to present evidence that, at best, is virtually unobtainable. For example, the National Agricultural Chemicals Association would require a terminated dealer who cannot prove total compliance with a seller's nonprice restraints to present, as a "minimum," "solid evidence" that: (1) other dealers had also not complied with nonprice restraints; (2) other

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[6] 662 F.2d 935 (2d Cir. 1981), *cert denied*, 103 S.Ct. 176 (1982).

[7] 684 F.2d at 1239 n.8.

[8] Brief of Respondent Spray-Rite Service Corporation.

dealers' noncompliance was similar to that of the terminated dealer; (3) other noncomplying dealers had not engaged in price-cutting; (4) the manufacturer had knowledge of their noncompliance but did not terminate them; and (5) there was no other reason why the dealer might have been terminated.[9] To make this showing, a plaintiff would have to obtain extensive information about the behavior not only of the manufacturer but also of a large number of dealers with respect to price and nonprice matters, ascertain the state of the manufacturer's knowledge about the dealers' behavior, and establish the particulars of the course of dealings among them over what might well be an extended period. Much of this information could, under the best of circumstances, be obtained only with the greatest of difficulty and at considerable expense; in most instances, the information would not be available at all. Hence, this proposed standard would effectively preclude any recovery by a dealer terminated because of a vertical price-fixing conspiracy.

Monsanto also argues that the Seventh Circuit improperly permitted a *per se* rule to be applied to nonprice dealer restraints imposed by Monsanto. According to the Seventh Circuit, "the [trial] court instructed the jury that Monsanto's otherwise lawful compensation programs and shipping policies were *per se* unlawful if undertaken as part of an illegal scheme to fix prices." 684 F.2d at 1237. On appeal, the Seventh Circuit addressed whether the jury had been correctly instructed to apply the *per se* rule to the vertical nonprice restraints on the basis of *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), or whether, as a result of *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), the legality of these vertical nonprice restraints should have been determined using a rule-of-reason analysis. The Seventh Circuit stated that the *per se* standard was proper, as the rule-of-reason approach "applies only if there is no allegation that the territorial restrictions are

[9] Brief Amicus Curiae of National Agricultural Chemicals Association in Support of Reversal at 9.

part of a conspiracy to fix prices." 684 F.2d at 1237. The Seventh Circuit's use of the word "allegation" is inappropriate but harmless in light of the fact that the jury responded "yes" to the special interrogatory: "Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto pursuant to a conspiracy to fix, maintain or stabilize resale prices on Monsanto herbicides?" 684 F.2d at 1233. Thus, the jury found there was not merely an allegation but the existence of a vertical price-fixing conspiracy. In light of the evidence of record that clearly supports the jury's determination and the Seventh Circuit's affirmance, this Court should not adopt an evidentiary standard that in reality precludes a dealer terminated pursuant to a vertical price-fixing agreement from recovery by making it virtually impossible for him to prove the existence of a conspiracy. For the reasons discussed below, AGMC firmly opposes any modification of the *per se* prohibition against vertical price fixing. It is equally opposed to any evidentiary standard, such as discussed above, that would have the same practical effect as modifying or overturning the *per se* rule.

II. The Long-Established Prohibition On Vertical Price Fixing Should Not Be Reconsidered Or Modified In This Case

In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 404-09 (1911), the Court held that vertical price fixing imposes a *per se* unreasonable restraint on trade and is illegal without examination of the underlying economic circumstances or asserted justifications. In an unbroken series of decisions during the intervening years,[10] this Court has con-

[10] *E.g.*, Rice v. Norman Williams Co., 102 S.Ct. 3294 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920); United States v. Colgate & Co., 250 U.S. 300 (1919). *Cf.* Albrecht v. Herald Co., 390 U.S. 145 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

sistently maintained this position. The long-established absolute prohibition against vertical price fixing, which has shaped the competitive structure for the distribution of goods in the United States, should be changed, if at all, only by Congress and not by the courts.

Refusal to reconsider or modify the *per se* prohibition of vertical price fixing would be consistent with the Court's recent observation that, "[o]nce established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials."[11] As a result of the absolute prohibition against vertical price-fixing agreements, sellers have been aware of the limits on their power with respect to their customers' pricing decisions. Buyers have understood that, if they suffer harm as a result of resisting a manufacturer's attempts to fix resale prices, they have potent legal remedies available that make their opposition to illegal action economically feasible, while if they join in a price-fixing scheme they risk civil and criminal penalties. By clearly delineating the permissible from the impermissible, the Court has made it possible for business entities at all levels of distribution to go about their business with an understanding of what is and what is not legal.

A. Any Modification Of The *Per Se* Prohibition Against Vertical Price Fixing Should Be Made By Congress And Not The Court, And Congress Has Already Endorsed This Prohibition

If a change is to be made in the treatment of vertical price fixing, and AGMC does not believe it should, it should be made legislatively. Congress is in a much better position than this

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[11] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977). While the Court noted that these "advantages are not sufficient in themselves to justify the creation of *per se* rules," *id.*, those advantages coupled with other reasons for continuing to prohibit vertical price fixing amply justify continued *per se* treatment.

Court comprehensively to weigh all the economic, political and social benefits that result from maintaining the current prohibition or modifying it.[12]

This Court recently recognized the appropriate role of Congress in making changes in the *per se* treatment of certain types of behavior when it stated:

> Our adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the *per se* rule in this case therefore are better directed to the legislature.[13]

Accordingly, the Court "declined the . . . invitation to cut back on the *per se* rule against price fixing." *Id.* at 2479.

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[12] *Cf.* Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 103 S.Ct. 1011, 1023 (1983) ("It is 'not for this Court to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.' "), *citing* United States v. Cooper Corp., 312 U.S. 600, 606 (1941).

[13] Arizona v. Maricopa County Medical Society, 102 S.Ct. 2466, 2478-79 (1982) (citation omitted). The Court's wisdom in recognizing that changes in *per se* treatment might more appropriately be made legislatively rather than judicially is supported by recent experiences regarding changes in *per se* treatment of other vertical restraints. In White Motor Co. v. United States, 372 U.S. 253 (1963), the Court held that it lacked sufficient information to determine whether the legal standard for judging vertical restraints should be changed. *Id.* at 263. In United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the Court nonetheless effected a change by accepting the United States' invitation to treat vertical nonprice restraints as *per se* unreasonable. Based on experience over the ensuing decade, the Court in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), found it necessary to repudiate the "abrupt and largely unexplained departure" effected by *Schwinn*, *id.* at 47, and return to the treatment long accorded vertical nonprice restraints.

The Court similarly should decline the Department of Justice's invitation to modify the *per se* prohibition of vertical price fixing in this case, and instead leave this issue to Congress. The Court would thereby be faithful to the distinct roles of the Judiciary and the Congress, consistent with this Court's teachings and the recently expressed position of many in Congress. Numerous members of the Senate and the House of Representatives and attorneys general of most states have urged the Court to defer to Congress on this issue.[14] The House Committee on the Judiciary recently expressed its dissatisfaction with the Department of Justice's attempt to have the Court rather than the Congress re-evaluate vertical price fixing:

> At the very least, this expansive use of certiorari to accomplish a sweeping revision of the law relating to the RPM [Resale Price Maintenance] indicates an insensitivity to the respective roles of the Congress and the Judiciary in the formulation and application of antitrust policy. More seriously, the Department's conduct in this private matter may prove to be a wholly unjustified allocation of resources in a bold attempt to circumvent the Congress.[15]

Similarly, a joint resolution sponsored by forty-seven Senators directs that, "[t]o the extent that the Attorney General or other Federal officials shall deem it necessary to change the law prohibiting vertical price restraints, such officials shall forward proposed legislation embodying such changes to Congress for proper consideration."[16] Moreover, the House Committees on the Judiciary and on Appropriations have each voted to cut off all funding for Department of Justice efforts in Fiscal Year 1984 to modify the *per se* prohibition on vertical price fixing. The Judiciary Committee explained that this action was "the Committee's missive that it will not tolerate

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[14] *See generally* Brief for the Undersigned Senators and Representatives as Amicus Curiae; *see also* Brief for the Thirty-Nine States as Amicus Curiae.

[15] H.R. Rep. No. 98-181, 98th Cong., 1st Sess. 22 (1983).

[16] S.J. Res. 105, 98th Cong., 1st Sess. (1983).

change in the carefully crafted, and congressionally-approved, antitrust policy concerning retail price-fixing without the consent of the people's elected representatives."[17]

In fact, Congress has approved the *per se* treatment that this Court has held should be used in connection with vertical price restraints. This approval was indicated by Congress' acquiescence over a long period of time with respect to this treatment. More significantly, approval was affirmatively demonstrated by Congress' repeal of antitrust immunity for firms acting under state "fair trade" statutes.[18] As this Court recognized, "Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual states." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977). The Court should not change a rule of law that has been legislatively approved by both silent acquiescence and affirmative ratification and should not adopt a position that is inconsistent with the will of Congress.

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[17] H.R. Rep. No. 98-181, 98th Cong., 1st Sess. 22 (1983). *See also Impact of Federal Antitrust Enforcement Policies on Small Business: Hearing before the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business of the House Committee on Small Business*, 97th Cong., 2d Sess. (1982); *Federal Antitrust Enforcement and Small Business: Joint Hearing Before the Senate Committee on Small Business and the Subcommittee on State, Justice, Commerce, the Judiciary, and Related Agencies of the Senate Committee on Appropriations*, 97th Cong., 2d Sess. (1982).

[18] The Consumer Goods Pricing Act, 89 Stat. 801 (1975), *amending* 15 U.S.C. §§ 1, 45(a), was passed with unanimous consent by the Senate, 121 Cong. Rec. S20874 (Dec. 2, 1975) and was overwhelmingly approved, by a vote of 380 to 11, by the House of Representatives, 121 Cong. Rec. H7104 (July 21, 1975). The Brief for the Undersigned Senators and Representatives as Amicus Curiae, filed in this case, contains a detailed discussion of the legislative history of this repeal and the views of Congress regarding vertical price fixing.

B. If This Court Re-Examines The Standard For Assessing The Illegality Of Vertical Price-Fixing Agreements, It Should Again Rule That They Are *Per Se* Illegal

Vertical price-fixing agreements properly fall within the category of *per se* illegality "because of their pernicious effect on competition and lack of any redeeming virtue." *Cf. Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). Such agreements lessen interbrand and intrabrand competition and, moreover, do not contribute to the attainment of any economically acceptable goal. On the contrary, these restraints impede the efficient operation of a competitive marketplace. As one commentator has recently observed: "[C]ontrary to the Bork-Posner model, vertical restraints are the result not the cause of increased distributional efficiency! They represent a desperate counterattack on the part of the besieged, less efficient elements in the trade to stem or roll back the rising tide of distributional productivity."[19]

1. Resale Price Maintenance Would Destroy Effective, Pro-Consumer Intrabrand Competition

Manufacturers' resale price maintenance programs would constitute the most decisive vehicle for eliminating all intra-band competition, especially if coupled with a nonprice restraint program. Resale price maintenance agreements strike directly at the fundamental competitive strategy used by price-competitive retailers, who offer consumers an alternative to higher-priced distributors. The lower-priced option offered by some retailers, including AGMC members, assures that consumers retain the freedom to choose whether they value the combination of image, convenience, promotion and service offered by higher-priced distributors more than they value the combination of those factors, together with a strong price emphasis, provided by price-competitors. In the absence of resale price maintenance, market dynamics can determine

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[19] Steiner, *Vertical Restraints and Economic Efficiency*, Working Paper No. 66 at p. 18, Bureau of Economics, Federal Trade Commission (1982).

which type of distribution will be most attractive to consumers and thus will maximize product sales. The continuance of intrabrand price competition assures, moreover, that the factor of price, referred to as "the central nervous system of the economy,"[20] will be available as a clear reference point whereby consumers may readily make and register their decisions on the value offered them by competing distributors.

In addition, the *per se* rule against resale price maintenance encourages the development and growth of innovative forms of retail competition. Department, variety, and discount stores are only a few of the competitive formats which have emerged in past years, and catalog, outlet, and off-price stores are some of the more recent examples of innovative retail enterprises. Many of these originate as small business enterprises and would be blocked at the entry threshold, unless given the chance to demonstrate that they can operate efficiently. Foreclosing these retailers from competing in price using manufacturers' leading brands effectively chokes off their business opportunities.

Thus, existing law and economic efficiency both militate in favor of consumers being afforded the widest choice of retail mix in shopping for a manufacturer's product, with the opportunity assured to choose on the basis of price or any other factor of importance to the consumer. Retailers representing all types of competitive strategy, including those emphasizing nonprice considerations, have been successful under current law, and the distribution system has been effective. This point is forcefully made by Professor Lawrence Sullivan:

> [T]he cost and revenue functions of the neighborhood store, the outlet in a local shopping center, in a regional center, or in the urban department store will differ markedly. If these outlets are left to price for themselves, there will tend to be price variations too. To the extent consumers value the convenience and service of the local market, that outlet will be able to price at a level covering

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[20] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

> its higher costs, even though higher volume, more efficient outlets charge less. Any single price the manufacturer may set will inevitably distort those fine variations which the market can make and will tend to hold the more efficient outlets, which would price at the lowest level, to a price at or near that which will be charged by the least efficient. The latter will no longer have to justify in added convenience the additional price they charge.
>
> To vault from the recognition that the manufacturer would tax its own long range interests were it to set a minimum resale price which restricted output at the dealer level to the conviction that the manufacturer, better than the market, had grasped and penetrated the myriad data and come up with precisely that figure which—even though expressed as a minimum price, not a maximum one—would assure the highest output at the dealer level, is to engage in the most fanciful non-sequitur. Business firms frequently make decisions that are adverse to their own best interest; there is no economic law against it. The only economic law of relevance is that which says that if competitive conditions are maintained, the market will tend to select out for favor those firms which make the best decisions.[21]

A faulty premise underlies the argument that a *per se* rule is no longer warranted since intrabrand competition can be stifled just as effectively by nonprice vertical restraints as by resale price fixing. Affording rule-of-reason treatment to resale price fixing would enable a manufacturer to combine both price and nonprice restraints and thereby totally eliminate intrabrand competition. The propriety of such a combination is, in fact, asserted in the *amicus curiae* brief of National Agricultural Chemicals Association at 15-23. In part because nonprice vertical restraints are subject to the rule of reason, it is particularly important to retain the *per se* prohibition

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[21] L. Sullivan, *Antitrust* at 381-82 (1977). In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951), the Court held that vertical price-fixing agreements, whether they set maximum or minimum prices, "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

against vertical price fixing, thereby preserving the possibility that some effective intrabrand competition will exist.

Resale price maintenance constitutes, by definition, an absolute preclusion of retail price competition in a manufacturer's product, whereas such competition is virtually always present within a nonprice restrictive framework. Even if the manufacturer undertakes to implement a system whereby retailers are confined to the territories in which they operate, there will always be opportunity for competition at the fringes. Even though retailers may be confined, assuming a restraint is reasonable, consumers cannot be prevented from travelling to price-competitive retailers. In addition, fixed resale prices make it much easier to detect, and thereby deter, any efforts by distributors to generate intrabrand competition.

Since it is highly unlikely that many manufacturers will employ airtight nonprice vertical restraints, opportunities for widespread price competition exist. Nonprice restraints are not *per se* lawful, but must be tested under the rule of reason involving an assessment of the character and purpose of the restraint.[22] If the restraint is more confining than justified by the objective, then the manufacturer's program is in jeopardy. Accordingly, a manufacturer's caution in designing a program to increase the likelihood of its passing muster under a rule-of-reason analysis enlarges the opportunities for intrabrand price competition. By definition, no latitude for any intrabrand price competition would exist under a resale price maintenance scheme.

Finally, experience has shown that permitting vertical price-fixing agreements threatens the continued survival of many small retailers. The Congressional Research Service, for example, performed a statistical analysis of business failures in 1972 that led to the conclusion that the rate of business failures in states with fully effective "fair trade" laws was 55 percent

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[22] Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

greater than in free trade states.[23] Another Congressional Research Service analysis indicated that retail stores of all sizes in "free trade" states experienced, during the period 1956-1972, a 32 percent greater growth rate than did similar stores in "fair trade" states.[24]

2. Rule-Of-Reason Treatment Of Vertical Price Fixing Will Facilitate Elimination Of Interbrand Competition

A principal basis for the Court's decision in *GTE Sylvania* to treat vertical price and nonprice restraints differently was the Court's acknowledgment that "resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands."[25] In fact, from the beginning this Court has recognized the debilitating effect that vertical price fixing has on interbrand competition,[26] and it has recently reaffirmed the continuing validity of this determination.[27] A modification of the *per se* treatment accorded vertical price fixing, with the

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[23] *Fair Trade: Hearings on S. 408 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 94th Cong., 1st Sess. 333 (1975) ("*1975 Senate Hearings*") (Statement of Howard Useem, Economic Analyst, Economics Division, Library of Congress Congressional Research Service); *see also* Lee, *The Impact of Fair Trade Laws on Retailing*, 41 J. Retailing 1 (Spring 1965).

[24] *1975 Senate Hearings* at 333 (Statement of Howard Useem, Economic Analyst, Economics Division, Library of Congress Congressional Research Service).

[25] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977) (original emphasis), *citing* White Motor Co. v. United States, 372 U.S. 253, 268 (1963) (Brennan, J. concurring).

[26] *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911) (a manufacturer imposing resale prices "can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.").

[27] *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 103 (1980).

resultant decrease in both intrabrand and interbrand competition, would be inconsistent with *Continental T.V., Inc.* v. *GTE Sylvania Inc.* It would also be inconsistent with the pro-consumer orientation of the antitrust laws.[28]

Even some of the leading commentators who advocate substituting a rule-of-reason analysis for *per se* treatment of vertical price fixing acknowledge that vertical price-fixing agreements provide a convenient mechanism for horizontal price fixing.[29] This danger is also tacitly recognized by the Department of Justice's concession that vertical price fixing would be unlawful where the economic conditions in the marketplace are such that vertical price fixing would facilitate horizontal price rigidity or a reduction in horizontal price competition.[30]

The establishment of identical, or minimum, resale prices for all the seller's customers in an area presents a precise and convenient reference point for competitors of both the seller and the buyer. It announces the seller's policy of eliminating price competition at the distribution level and signals the exact price at which competition will cease. By adopting a resale maintenance program, a manufacturer notifies his competitors that it is not likely to seek expanded distribution by reducing the price of its goods to its retailers in the hope that they will pass on reductions to consumers. The devices used by the seller to communicate his designated resale price—price announcements, price lists, distributor and retail mailings—are

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[28] *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979) ("It is in the sound commercial interests of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system. The essence of the antitrust laws is to ensure fair price competition in an open market.").

[29] *See, e.g.*, R. Bork, *The Antitrust Paradox* 292-95 (1978); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger, and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 294 (1975).

[30] Brief for the United States as Amicus Curiae in Support of Petitioner at 24 n.34 ("United States Brief").

very nearly as much an open invitation to competitors as an instruction to customers. Thus, as long as sellers are not prohibited from entering into vertical price-fixing agreements, they can use these agreements to communicate with their competitors and invite them to engage in similar price practices. Nonprice vertical restraints, in contrast, do not offer tools for such communication among competitors.

Vertical price fixing also has the effect of stabilizing horizontal price-fixing agreements. As one commentator has observed:

> If suppliers choose to shave the cartel price in order to increase volume, they can offer open or secret discounts to dealers with some expectation that the discounts can be passed along to consumers. Industry-wide resale price maintenance would make open dealer price-cutting impossible, and would thus diminish the incentives for supplier price-cutting and thereby assist in stabilizing the cartel.[31]

Participants in a horizontal price-fixing arrangement can more easily police adherence to their illegal scheme when a clearly ascertainable reference point is available. Using third parties such as distributors and brokers to monitor vertically imposed prices, horizontal price fixers at the manufacturer level quickly learn of deviations from their illegal agreements and can act to bring the price-cutting participant back into line. This Court has recognized the pro-competitive benefits when participants in price-fixing arrangements undercut the fixed price, and has condemned mechanisms facilitating detection of behavior that destabilizes price-fixing cartels.[32]

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[31] Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restraints*, 78 Colum. L. Rev. 1, 15-16 (1978), *citing* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger, and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 294 (1975), and Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86, 97 (1960).

[32] *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29, 43-48 (1960); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 456 (1922).

Resale price maintenance also eliminates the downward pressure from retailers on wholesale prices that can disrupt horizontal price-fixing cartels.[33] Many retailers pursue a strategy of aggressive pricing, in which they accept a low markup per sale but compensate by doing a large volume of business. Individual price-competitive retailers successful with this mode of selling are able to exert pressure on their suppliers to lower wholesale prices and can thereby further reduce retail prices. Rivals of these price-competitive retailers also independently seek reduced wholesale costs from the same manufacturer or manufacturers of competing brands in order to contend for retail sales. The overall impact is to dislodge manufacturers' interdependent pricing parallelism.

A massive volume of testimony and economic data was presented to Congress in 1975 when it considered and repealed the legislation which permitted the states to adopt "fair trade" statutes. This evidence corroborates the hypothesis that vertical price fixing abets either express or tacit collusion at the horizontal level. This material demonstrates the actual, harmful consequences of legalized vertical price fixing on consumer prices and on small business.[34] Among the major proponents of repeal of the "fair trade" statutes was the Department of Justice, which provided Congress with the results of surveys that measured the impact of resale price maintenance on consumer prices. A 1956 Department of Justice survey of products sold both in "fair trade" and in "free trade" jurisdictions disclosed that consumer prices for "fair traded" goods ranged

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[33] *See generally* Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints*, 1981 Duke L.J. 417.

[34] *See generally Fair Trade: Hearings on S. 408 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 94th Cong., 1st Sess. (1975) ("*1975 Senate Hearings*"); *Fair Trade: Hearings on H.R. 2384 Before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee*, 94th Cong., 1st Sess. (1975) ("*1975 House Hearings*").

from 19 to 27 percent higher in the "fair trade" states.[35] A 1970 survey compared the prices of "fair traded" items in discount and department stores in "free trade" states during the week of June 26, 1970 with their "fair trade" prices and found that, for a majority, "free trade" prices ranged from 0.2 percent to 37.4 percent lower.[36] Estimates of the total extra cost to the consumer as a result of resale price maintenance under the "fair trade" statutes varied in amount but, as the House Committee on the Judiciary observed, "[w]hatever the exact figure, it is beyond dispute that resale price maintenance increases the cost to the consumer."[37] For example, the Department of Justice estimated in 1975 that eliminating resale price maintenance by repealing "fair trade" statutes would save consumers approximately $2 billion per year,[38] while the Congressional Research Service estimated the cost of fair trade to consumers in 1973 to have been between $874 million and $8.85 billion.[39]

It is an unrealistic response to this seriously adverse consequence of resale price maintenance to claim that horizontal collusion resulting from such programs can be independently

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[35] *1975 Senate Hearings* at 174-175 (Statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division).

[36] *1975 Senate Hearings* at 174-75 (Statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division); *1975 House Hearings* at 110 (Statement of Keith I. Clearwaters, Dep. Assistant Attorney General, Antitrust Division).

[37] H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3 (1975).

[38] *1975 House Hearings* at 114 (Statement of Keith I. Clearwaters, Dep. Assistant Attorney General, Antitrust Division). The Senate Committee on the Judiciary similarly stated in 1975: "Studies by the Department of Justice which were cited in a 1969 Economic Report of the President, indicate that the consumers would be saved $1.2 billion a year by the elimination of the fair trade laws. Updated for inflation this figure comes to $2.1 billion." S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 (1975).

[39] *1975 Senate Hearings* at 331-32 (Statement of Howard Useem, Economic Analyst, Economics Division, Library of Congress Congressional Research Service).

attacked under the antitrust laws.[40] Proof of collusion is not easy to obtain except in rare instances. The need for express agreements among competing manufacturers to implement a coordinated pricing strategy would, moreover, be reduced or eliminated completely by signals emanating from a resale price maintenance network. In fact, it may very well be that overt or express, *i.e.*, detectable, conspiracies occur most often in those industries *least* conducive to the tacit collusion that could be fomented by generally prevalent vertical price restraints.

Perhaps recognizing the elusiveness of proof in these circumstances, the Justice Department states that "if the market characteristics allow the possibility of anticompetitive effects and no free-rider problem is apparent, then in the absence of a showing by the defendant that the particular resale price maintenance system promotes competition, it should be deemed unlawful."[41] Such a concession, however, holds out no realistic hope for preventing the anticompetitive consequences flowing from vertical price fixing, because the courts will be called upon in each instance to evaluate the market structure, entry conditions, demand and supply elasticity, and possibly a host of other considerations when determining under the rule of reason whether a particular vertical price-fixing agreement aided in the destruction of horizontal interbrand competition and hence was unreasonable.

The eroded deterrence, inherent ambiguity, and imposition on judicial resources of such an analysis are adverse consequences that this Court has sought to eliminate from antitrust enforcement and litigation.[42] The sort of market analysis that may be appropriate in the case of vertical nonprice restraints, which might have a positive influence on expanded distribution and hence interbrand competition,[43] can only pro-

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[40] United States Brief at 23-24, 27.

[41] United States Brief at 24 n.34.

[42] Illinois Brick Co. v. Illinois, 431 U.S. 720, 741 (1977).

[43] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-57 (1977).

duce harmful results under price maintenance, which poses an inherent threat to horizontal competition at the manufacturer level.[44]

3. Vertical Price-Fixing Arrangements Are Not Necessary To Accomplish Any Legitimate Purpose

While decreasing both interbrand and intrabrand competition, vertical price restraints lack any "redeeming virtues" to justify their existence. A number of suggestions have been made about ways in which vertical price fixing might enable manufacturers to accomplish legitimate goals;[45] however, each of these goals could be achieved through less restrictive alternatives. Accordingly, there is no justification for treating vertical price fixing as other than illegal *per se*.

Advocates of vertical price fixing have attempted to justify it on the ground that by eliminating intrabrand price competition a manufacturer can enhance interbrand competition because retailers will have to engage in nonprice competition.[46] There is, however, no assurance that retailers who receive additional revenues because the fixed retail price exceeds that which free market forces would yield will use the extra money in the way that the manufacturer desires. As a result, if a manufacturer believes a certain approach will enhance the sale of his products, he should act directly to see that this approach

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[44] The market configuration test proposed by the Justice Department would produce capricious results in some circumstances. Thus, it may be that those advocating such an approach would be more inclined to invalidate resale price maintenance if it is widely used by all or nearly all manufacturers of a product. Such an approach would result in condemnation of a manufacturer's program depending on the subsequent adoption of resale price maintenance by his competitors.

[45] *See, e.g.*, R. Bork, *The Antitrust Paradox* 288-91, 297-98 (1978); United States Brief at 21-29.

[46] *See, e.g.*, United States Brief at 21-23; Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86, 89-96 (1960).

is followed.[47] For example, the manufacturer itself could engage in promotional activities such as providing product demonstrations or conducting an advertising campaign. Alternatively, the manufacturer could pay promotional and other allowances to retailers who provide services deemed by the manufacturer to make the product more competitive.

There are additional advantages to requiring the manufacturer to act directly with respect to promotion. A primary benefit, of course, is that it leaves intact the retailer's freedom to establish his own prices. This assures some continued level of intrabrand competition even as the manufacturer's marketing strategy is having its affect on interbrand competition. At the same time, prohibiting the manufacturer from distorting his customer's prices places the cost of financing the manufacturer's marketing strategy where it properly should be—on the manufacturer. Thus, the marketplace will impose checks on the cost-effectiveness of the manufacturer's strategy, by placing the financial risk on the manufacturer.[48] If the retail price is elevated by the manufacturer to pay for nonprice competition that does not work, the retailer will suffer the loss since he will already have paid for goods that cannot be sold at the vertically imposed price.

A manufacturer can also realize in-depth distribution of his products under current law by the use of nonprice restrictions such as zones of primary responsibility, limited location sales clauses, territorial limits on solicitation and a wide range of

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[47] Where the manufacturer engages in promotional activities, all retailers benefit. Such is the case, for example, when a manufacturer prepares technical information for distribution or provides or pays for product demonstrations.

[48] An attempted justification of resale price fixing is that it attracts and keeps retailers. *See* notes 45 and 46 *supra*. The alternative that enhances competition and accomplishes the same goal is to offer products desired by consumers and keep the manufacturer's margins low. In this way, the product will compete more effectively against other products, and the consuming public will not pay a premium to underwrite less efficient retailers.

other similar provisions. Such vertical nonprice restrictive devices offer the manufacturer the opportunity for testing whether limitations on distribution do expand product sales without erasing all price competition in the resale of his brand.

In further support of removing the prohibition on vertical price fixing, some have advanced the theory that removing pricing freedom will enhance competition by eliminating so-called "free-riders."[49] Under this theory, only when vertical price fixing is permitted will retailers offer special services to promote the sale of a product (*i.e.*, compete on nonprice matters) because otherwise "the retailers who do not provide the special services get a free ride at the expense of those who have convinced consumers to buy the product."[50] Thus, these theorists speculate that vertical price fixing enhances interbrand competition by eliminating the "free rider" disincentive to promotional activities. Because of this theory's limited theoretical applicability and its failure to describe actual behavior even where it would theoretically apply, the asserted "free rider" phenomenon does not justify relaxing the *per se* treatment of vertical price fixing.

The "free rider" theory is, by its own logic, limited to very few types of services and products. There can be no "free riding" with respect to services that a retailer provides only for products he has already sold, since those services would not be available to customers of other retailers. It is also impossible to take a "free ride" with respect to services that are not specifically related to a particular product but rather have to do with the way that a retailer conducts its business, such as providing luxurious surroundings or a particularly convenient location with ample parking. And no "free ride" can be taken with

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[49] *See, e.g.*, R. Bork, *The Antitrust Paradox* 290-91 (1978); R. Posner, *Antitrust Law* 149 (1976).

[50] Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86, 91 (1960).

respect to services paid for separately from the product.[51] In addition, most types of products do not lend themselves to "free riding." There can be no "free riding" with respect to products whose consumption is not significantly affected by nonprice promotional activities of retailers. For most types of goods, consumers make their decisions based principally on price, personal preferences and experience, and only rarely seek guidance or assistance from the retailer.

Thus, the notion of the "free rider" is extremely limited with respect to the types of goods and services to which it could theoretically apply. Even theoretically, "free riding" is possible only in connection with promotional activities, affecting a consumer's purchasing decision about a specific product, that a dealer provides at his own expense prior to a sale and that convey transferable benefits.[52] While the theory predicts that a consumer will obtain help needed to make a choice from one retailer and then purchase the product from another that does not provide such assistance, this behavior is not, in reality, commonly observed. Moreover, there is no theoretical reason why permitting vertical price fixing would eliminate "free riding." Nothing would prevent a retailer whose prices were fixed from offering a promotional service different from other retailers, so that consumers could take advantage of both. For example, vertical price fixing would not prevent a retailer from providing post-sale services, such as free delivery, instead of

[51] For example, if a retailer offers a service contract for sale in connection with products it sells or is reimbursed by the manufacturer for performing warranty work, competitors cannot take a "free ride" on these services since the retailer is compensated for providing them regardless of where the product was initially purchased. Where the retailer absorbs the cost of providing warranty service, it need provide this service only with respect to products it has sold; presumably the cost of the warranty was included in the purchase price received.

[52] Of course, a manufacturer who conducts or pays for promotional activity eliminates even the theoretical possibility of "free riding" while assuring that the product receives the promotional activity the manufacturer believes is most beneficial.

pre-sale promotional services available from competitors. Thus, where "free riding" is theoretically possible, vertical price fixing will not prevent it.

Equally significant, the "free rider" theory does not comport with reality. For over 70 years, vertical price fixing has been *per se* illegal, and nonetheless our economy demonstrates a robust diversity of retailing strategies, including specialty stores, expensive department stores, and discount stores. The co-existence of different types of successful retailing operations could not be explained if the "free rider" theory were valid. Not only do different types of stores successfully compete, but many engage in promotional activities, which is clearly inconsistent with what proponents of the "free rider" theory would predict. Moreover, there has been no showing that retailers who charge less for goods provide less in the way of many important, product-related services than do their higher-priced competitors. On the contrary, as one informed observer has stated:

> The Bork-Posner school does not seem to have entertained the proposition that the lower prices reflect lower costs for the performance of those services which are provided by both types of retail stores, nor that the discounter's total service package might more accurately be described as different than rather than inferior to the one offered by the so-called "full service" retailer.[53]

Finally, the pejorative tone of the clever phrase "free rider" must not be allowed to mask who is really being described—traders who compete for sales by offering their products at competitive prices. Nor must this phrase be allowed to obscure the fact that the economic activity in which these businesses engage—vigorous price competition—has almost invariably been recognized as eminently desirable by virtually everyone

[53] Steiner, *Vertical Restraints and Economic Efficiency*, Working Paper No. 66 at p. 13, Bureau of Economics, Federal Trade Commission (1982).

except competitors who wish to escape competition.[54] Vigorous price competitors are an important force in retailing whose continued existence will assure that consumers can obtain the combination of goods and services they desire at the lowest possible price. The self-correcting mechanism of the competitive retail marketplace should not be hindered on the basis of a flawed theory.

CONCLUSION

The Court should limit its review of this case to the issues raised by Monsanto and addressed by the parties. AGMC urges the Court to resolve these issues in such a way that price-competitive retailers can effectively protect themselves from price-fixing conspiracies. The Court need not and should not again address whether vertical price fixing is *per se* illegal. If, however, the Court chooses to consider this issue, it should

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[54] Protection from price-competitive retailers has consistently been an argument used in an attempt to justify vertical price fixing. *See, e.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 374-75 (1911). The Court has invariably rejected this argument. *See* note 10, *supra*.

strongly reaffirm the legal principle that has served effectively for over 70 years to promote competition and benefit consumers in the United States.

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